these conditions. It could not be more relevant to the issue of diminished responsibility. It is well capable of belief because it is the professional evidence of a professional man of some small eminence in relation to the subject of which he speaks and taken with the other evidence in the case it would clearly have had a very considerable influence on the mind of any reasonable jury.

The only difficulty is as to whether it satisfies the condition, that is to say it was not available at the trial. In a strictly literal sense, of course, that is made out. It was not available at the trial in the sense that at the time of the trial Dr. Yap had never even set eyes on the appellant. That, however, is not enough. On the depositions it must have been clear from the nature of the killings that, to put it at the lowest, the mental condition of the appellant invited some inquiry. In the circumstances it was the duty of counsel to ensure that some sort of examination was made by a competent medical man to ascertain whether there was any what might be called medical material to show that such a defence as diminished responsibility was available and if there was such medical evidence then it was the duty of counsel for the defence to call it. We would therefore normally be extremely reluctant to say that evidence was not available simply because a medical man had not been consulted until after the trial when he or somebody equally competent could have been consulted before it.

In the present case, however, we had the extraordinary state of affairs that defence counsel embarked upon, and almost up to the end continued in, his duties in a state of complete ignorance as to an important statutory defence to a charge of murder. We are not suggesting for one moment that any ignorance of the law on the part of counsel should necessarily avail a prisoner anything in every case. The law relating to murder, however, is the most fundamentai portion of all our law. It governs the conditions in which society may take away life; an error in its application may be such that it can never be repaired. The offence is set out in black and white in the Penal Code, as are the principal defences available to a person charged with it, and everything that goes to make up justice demands that we should treat ignorance of the very existence of one of these defences as such a wholly exceptional circumstance as to justify our doing anything possible within the limits of our statutory powers to ensure that such a circumstance has not led to error. For that reason we granted leave to call Dr. Yap before us to give evidence and at that stage we were much assisted by the Solicitor-General stating that the prosecution would not wish to call any rebutting evidence, although of course they reserved their right to cross-examine Dr. Yap.

Later we heard the evidence of Dr. Yap which fully substantiated everything contained in his affidavit and was not in any way shaken in cross-examination. In the event we found ourselves compelled to a very firm view to the effect that had that evidence together with the evidence as to the nature of the killings been before the trial court and had the law relating to the incidence and quantum of proof been correctly stated to the jury (as it was) then no reasonable jury could possibly have come to any conclusion other than that the defence of diminished responsibility was made out.

In the circumstances we did not think we were justified in ordering a re-trial but considered it proper to quash the convictions for murder, to substitute convictions for culpable homicide not amounting to murder and to impose a sentence of life imprisonment in respect of each conviction.

Convictions for murder quashed; Convictions for culpable homicide not amounting to murder substituted, and sentence of life imprisonment imposed.

Solicitors: *Drew & Napier.*

KECK SENG & CO. LTD. v. ROYAL EXCHANGE ASSURANCE

[O.C.J. (Ambrose J.) April 24, 1964]

[Singapore — Suit No. 716 of 1962]

Insurance — Marine insurance — Policy insuring bags of sugar — Damage to sugar — Whether damage due to inherent vice — Whether policy insured against damage due to inherent vice — Whether policy insuring against damage by sweating covered damage due to inherent vice — Meaning of "sweat".

This was a claim on a policy of marine insurance. The policy insured 4980 bags of white sugar shipped from Dairen to Singapore. The risks covered by the policy included the risk of damage by rain or fresh water, sea water and sweating but subject to the Institute Cargo Clauses (All Risks). Clause 6 of the Institute Cargo Clauses (All Risks) provides as follows:— "This insurance is against all risks of loss of or damage to the subject-matter insured but shall in no case be deemed to extend to cover loss damage or expense proximately caused by delay or inherent vice or nature of the subject-matter insured...."

On arrival in Singapore 3849 bags were found to be partly damaged by becoming wet.

Held: (1) the cause of the damage was the inherent vice of the sugar of absorbing moisture from the atmosphere;

(2) the policy was subject to clause 6 of the Institute Cargo Clauses (All Risks) and did not cover loss or damage caused by inherent vice or nature of the subject-matter insured;

(3) by virtue of section 5(1) of the Civil Law Ordinance, the defendants could invoke section 55(2)(c) of the Marine Insurance Act, 1906, which provides that,

unless the policy otherwise provides, the insurer is not liable for inherent vice or nature of the subject-matter insured;

(4) the defence of inherent vice could only be excluded by express words or by necessary inference, i.e. by covering a peril which could only be caused by inherent vice;

(5) sweat, correctly speaking, is moisture in the air condensing on the ship's steel-work and dripping afterwards on the cargo or condensing directly on cargo; damage by sweating, in this sense, is a peril which could only be caused by an external cause and not by inherent vice; by insuring against the specific risk of damage by sweating, the plaintiffs had not, by express words or by necessary inference, insured against loss or damage caused by inherent vice;

(6) by the usage of surveyors, the term "sweat" covers the dampness of sugar caused by the absorption of moisture from the atmosphere; if this usage is correct, damage by sweating is a peril which could be caused either by an external cause or by inherent vice and by insuring against damage by sweating, only loss or damage resulting from sweating caused by an external cause is covered by the policy.

[**Editorial Note:** It is understood that an appeal was lodged against the judgment in this case but was subsequently withdrawn.]

Case referred to:—

(1) *British and Foreign Marine Insurance Co.* v. *Gaunt,* [1921] 2 A.C. 41 at p. 57; [1921] All E.R. Rep. 447.

SUIT.

J. F. McWilliam for the plaintiffs.

M. Karthigesu for the defendants.

Ambrose J.: This was a claim on a policy of marine insurance. The policy insured 4,980 bags of white sugar shipped from Dairen to Singapore by the steamship *Hild.* The sugar was packed in gunny bags of 100 kilogrammes net each. The ship sailed on or about the 2nd December, 1961, and arrived on the 10th December, 1961. During the voyage the contents of 3,849 bags became partly damaged by becoming wet.

The statement of claim alleged that the policy covered all risks including the risk of damage by rain or fresh water, sea water and sweating; and that the damage was caused by sweating.

The defence denied that the policy covered all risks, and alleged that the risks covered by the policy included the risk of damage by rain or fresh water, sea water and sweating but subject to the Institute Cargo Clauses (All Risks). And the defence denied that the cause of the damage to the goods was within the meaning of the word "sweating" as used in the policy.

There is an indorsement on the face of the policy in these words:

"This policy is to have the same force and effect and to be subject to the same terms and conditions as the corporation's standard form of marine policy including the Institute Dangerous Drugs Clause plus any other extensions, restrictions or amendments as may be indicated hereunder. The Institute Clauses referred to herein are those current at the date of issue of this policy".

The policy states that the insurance is an insurance upon the 4,980 bags of sugar "Including the risk of damage by rain or fresh water, sea water and sweating". These words are immediately followed by the indorsement "Subject to the Institute Cargo Clauses (All Risks)". Clause 6 of the Institute Cargo Clauses (All Risks) provides as follows:

"This insurance is against all risks of loss of or damage to the subject-matter insured but shall in no case be deemed to extend to cover loss damage or expense proximately caused by delay or inherent vice or nature of the subject-matter insured. Claims recoverable hereunder shall be payable irrespective of percentage".

The first question I was called upon to decide was what was the cause of the damage. L. W. Norman, a cargo surveyor, was employed by the plaintiffs to survey and report upon the 4,980 bags of sugar which were discharged out of the steamship *Hild.* He made his survey on the 13th and 14th December, 1961, at Alkaff Quay, where the bags were being discharged from lighters, at the plaintiffs' store at Havelock Road, and aboard an on-carrying vessel. His report, Ex. A. B. 14, 15 and 16, bears the date 2nd February, 1962. The summary of damage set out in the report is as follows, the percentages being the extent of the loss which would be incurred in selling the sugar because of the wetness:

859	bags wet and stained on two sides, internally wet and tending to block,	12½%
1261	bags wet and stained on one side, internally wet and tending to block,	7½%
1729	bags externally unstained, internally wet and tending to block,	2½%
1041	bags undamaged.	

Norman was called by the plaintiffs and gave the following evidence. The characteristics of the staining of the bags indicated that condensation had taken place. Condensation is the action of moisture in the atmosphere forming into water droplets on the cold surface of the bags of sugar. His reason for coming to the conclusion that condensation had taken place was that the wet patches on the bags were those areas which were exposed for condensation to form. In his opinion, the wetness of the sugar was the result of condensation forming on the bags of sugar in the hold of the carrying vessel, which often happens when cargoes are shipped in cold weather and transported to tropical waters, and the subsequent absorption of the condensation by the sugar, as sugar is hygroscopic, that is, will absorb water.

Norman's report gives the cause of the damage as "sweating; due to nature of sugar". And it states, "The fact that most bags were wet internally and some externally unstained indi-

cates that the damage is the result of sweating". There is nothing in the report to show that at the time it was written Norman held the view that the sweating was due to condensation: this was admitted by Norman in cross-examination. Norman testified that the term "sweating" is applicable to dampness of sugar caused by absorption of moisture from the atmosphere: and it was clear that he used the term in this sense in his report. He also testified that the condition of the 1,729 bags which were externally unstained but internally wet indicated that there was no apparent condensation on the surface of these bags and that the wetness of the sugar was caused by the inherent nature of the sugar to absorb moisture from the atmosphere.

In my view, the opinion expressed by Norman at the trial that condensation had taken place was an after-thought. It seemed curious to me that Norman did not state in his report that the characteristics of the staining of the bags indicated that condensation had taken place; that the staining on the bags consisted of wet patches; and that the wet patches were those areas which were exposed for condensation to form. It seemed significant that Norman made no reference to condensation in his letter to the plaintiffs dated the 24th March, 1962, Ex. A. B. 4. There he says:

"The condition of the sugar in the bags is normally known as sweating and has been described as such in the report. This condition may be attributed to the hygroscopic nature of sugar contents".

J. B. Tunbridge, a cargo surveyor called by the defendants, gave the following evidence. The nature of the staining on the bags, as described in Norman's report, indicated that the staining was on the belly of the bags. If the damage had been caused by cargo sweat, that is, condensation of moisture on the surface of the bags, the staining would have been around the edges of the bags or in patches. As the staining was on the belly of the bags, the damage could not have been caused by cargo sweat. Norman's report indicated that some bags were wetter than others. It is quite possible for this to happen when the wetting is due to the inherent vice of sugar of absorbing moisture from the atmosphere. That is due to the way in which the bags are stacked in the hold.

Walter Rintoul, an analytic chemist called by the plaintiffs, testified in effect as follows. Sugar is hygroscopic when it tends to absorb moisture from the air and become moist. It is efflorescent when it exudes moisture and tends to cake. Sugar absorbs moisture when the relative humidity of the atmosphere is high. It exudes moisture when the relative humidity of the atmosphere is low. The degree of absorption or exudation of moisture depends on the degree of impurity of the sugar. Generally speaking, impure sugar contains calcium chloride, which is one of the most hygroscopic materials known. To decide whether any particular sugar is hygroscopic the degree of refinement would have to be determined. The sugar must be analysed before one can determine whether it has any inherent vice.

In my view, the fact that the sugar in 1,729 was internally wet although the bags were externally unstained indicated that the wetness was caused not by condensation on the surface of the bags but by absorption of moisture from the atmosphere. Therefore, although the sugar in the bags was not analysed, it seemed to me that the sugar was hygroscopic.

On the evidence before me, I came to the conclusion that the cause of the damage was the inherent vice of the sugar of absorbing moisture from the atmosphere. In my opinion, where sugar becomes wet by absorbing moisture from the atmosphere the wetness is not due to an external cause. The term "inherent vice" covers the natural behaviour of the subject-matter, being what it is, in the circumstances under which it is carried. This is clear from the following passage from the judgment of Lord Summer in *British and Foreign Marine Insurance Co.* v. *Gaunt*,[1] at p. 57:

"There are, of course, limits to 'all risks'. They are risks and risks insured against. Accordingly the expression does not cover inherent vice or mere wear and tear or British capture. It covers a risk, not a certainty; it is something, which happens to the subject-matter from without, not the natural behaviour of that subject-matter, being what it is, in the circumstances under which it is carried".

Before passing on to the second question, I considered the significance of the fact that the sugar in the 3,849 bags which was wet was tending to block. In Rintoul's view this indicated that the sugar since it was put into the bags had given off moisture. I accepted the suggestion that sugar tends to block or cake when it gives off moisture. But in my opinion, before the sugar began to give off moisture it must have absorbed moisture, as the ship was approaching Singapore, where, according to Norman, the relative humidity is high; and it tended to block after it was discharged into lighters at Singapore, as most probably the relative humidity of the open air was lower than that of the air in the hold.

The second question for determination was whether the policy covered the risk of loss or damage caused by inherent vice or nature of the subject-matter insured. I construed the original policy as covering all the risks mentioned in the Institute Cargo Clauses (All Risks) and also the risks of damage by rain or fresh water, sea water and sweating. Clause 6 of the Institute Cargo Clauses (All Risks) specifies the risks covered as follows:

"This insurance is against all risks of loss of or damage to the subject-matter insured but shall in no case be deemed to extend to cover loss damage or expense proximately caused by delay or inherent vice or nature of the subject-matter insured".

This clause makes it quite clear that the policy does not cover loss or damage caused by inherent vice or nature of the subject-matter insured. I found no substance in the contention of the plaintiffs that they were not bound by the Institute of Cargo Clauses (All Risks). If the plaintiffs were not so bound, it seemed to me that the defendants were entitled to invoke the provisions of section 55(2)(c) of the Marine Insurance Act, 1906, of England, by virtue of the provisions of section 5(1) of the Civil Law Ordinance (Cap. 24) which provides:

"In all questions or issues which arise or which have to be decided in the Colony with respect to the law of ....marine insurance....and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by Statute".

Section 55(2)(c) of the Marine Insurance Act, 1906, provides as follows:

"Unless the policy otherwise provides, the insurer is not liable for....inherent vice or nature of the subject-matter insured".

The third question I had to decide was whether by insuring against the specific risk of damage by sweating the plaintiffs, by express words or by necessary inference, had insured against loss or damage caused by inherent vice. I accepted as correct the following statement of the law in *British Shipping Laws*, Vol. 10, paragraph 859:

"*The defence of inherent vice can only be excluded by express words or by necessary inference — i.e. by covering a peril which could only be caused by inherent vice.* For example, where tinned goods are insured against 'blowing of tins' it is submitted that the defence of inherent vice is thereby excluded. But if the peril is one which (like mould and mildew) can be caused by some external agency, even though more commonly caused by inherent vice, the better view is that only damage from an external cause is covered".

Both counsel accepted as correct the view as to sweat expressed in the following extract from *Lloyd's Survey Handbook*, Revised Edition, 1956, at pages 29 and 30:

"Cargo is said to be damaged by *ship's sweat* when moisture condensing on ship's steelwork runs back on it and saturates it, or when cargo is wetted by contact with ship's steelwork on which moisture condenses. A corresponding expression has come into use during the last ten years to denote the condensation of moisture directly on the cargo, namely *cargo sweat*, a term which, if not absolutely correct, is in common usage and must be clearly defined.

In this case the moisture is not first condensed on ship's steelwork, dripping afterwards on cargo, but condenses directly on cargo, the ship's steelwork usually remaining dry".

According to this view, sweat is moisture in the air condensing on the ship's steelwork or directly on the cargo. I accepted this view. It seemed to me that sweat had nothing to do with inherent vice: this was conceded by counsel for the plaintiffs. Both counsel also accepted as correct the view expressed in the following extract from *Lloyd's Survey Handbook*, Revised Edition, 1956, at pages 45 and 46:

"Various commodities are hygroscopic and, if not packed in a water-tight container, may absorb the moisture content of the atmosphere to such an extent as literally to give the appearance of having been saturated; a surveyor might well, without a knowledge of the inherent properties of such commodities, attribute damage to sweat, contact with water, etc.".

As the peril of sweat could only be caused by an external cause and not by inherent vice, it seemed clear to me that by insuring against the specific risk of damage by sweating the plaintiffs had not insured, by express words or by necessary inference, against loss or damage caused by inherent vice.

Both Norman, the cargo surveyor called by the plaintiffs, and Tunbridge, the cargo surveyor called by the defendants, however, testified that according to the usage of surveyors the term "sweating" covers the dampness of sugar caused by absorption of moisture from the atmosphere. In the light of the two extracts from *Lloyd's Survey Handbook* which are set out above, I decided that this use of the word is incorrect. I proceeded to consider, however, what the position would be if this use of the word is correct. It seemed to me that, in that case, the most that could be said was that damage by sweating is a peril which could be caused by an external cause or by inherent vice. And applying the principle stated in the passage cited above from *British Shipping Laws* to a policy covering such a peril, I came to the conclusion that only loss or damage resulting from sweating caused by an external cause was covered by the policy.

It was for the above reasons that I dismissed the plaintiffs' claim with costs.

Claim dismissed.

Solicitors: *Laycock & Ong*; *Allen & Gledhill.*

Re MARTIN LEE; Ex parte BAN HIN LEE BANK LTD.

[O.Bk.J. (Choor Singh J.) April 25, 1964]

[Singapore — In Bankruptcy No. 297 of 1962]

Bankruptcy — Proof of debt — Adjudication on, by Official Assignee — Application to reverse or vary decision of Official Assignee — Bankruptcy Ordinance (Cap. 11), sch. B, r. 28.

Bankruptcy — Surplus — Rate of interest chargeable before receiving order and after — Bankruptcy Ordinance (Cap. 11), s. 43(7) & (8).